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Supreme Court No. ________

SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOSEPH L. SHALANT, Plaintiff and Appellant, v. THOMAS V. GIRARDI et al., Defendants and Respondents.	B211932 c/w B214302 (L.A.Super.Ct. No. BC 363843 c/w BC 366214)
JOSE CASTRO, Plaintiff and Respondent, v. JOSEPH L. SHALANT, Defendant and Appellant.	B214302 c/w B211932 (L.A.Super.Ct. No. BC 366214 c/w BC 363843)

SUPREME COURT
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Los Angeles Superior Court No. BC 366214 (c/w BC 363843)
Hon. Teresa Sanchez-Gordon

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PETITION FOR REVIEW

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PETITION FOR REVIEW

Petitioner Jose Castro hereby requests that this Court grant review of the April 5, 2010 partially published decision of the Court of Appeal, Second Appellate District, Division One. The Court of Appeal's opinion is attached hereto as Exhibit A, and its order denying Castro's petition for rehearing and modifying the opinion is attached hereto as Exhibit B.[1]

ISSUES PRESENTED

1. Does an attorney have a duty to disclose to a client that he has been enrolled inactive by the State Bar before the attorney enters into a new fee-splitting agreement with the client and successor counsel?

2. Should the Court of Appeal have granted rehearing pursuant to Government Code section 68081 where it decided the appeal based on an issue not raised by the appellant and not briefed by the respondent?

WHY REVIEW SHOULD BE GRANTED

Review should be granted to resolve an important question of law regarding an attorney's duty to disclose to an existing client that he has been enrolled inactive by the State Bar. In a jury trial, a jury found in favor of petitioner Jose Castro on his claim against his former attorney Joseph L.

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[1]This petition for review pertains to the unpublished portion of the Court of Appeal's opinion. Simultaneously with this petition, Thomas V. Girardi and National Union Fire Insurance Company of Pittsburgh PA, the parties affected by the published portion of the Court of Appeal's opinion, are jointly filing their own separate petition for review.

Shalant for breach of fiduciary duty. The factual basis for the fiduciary duty claim was that Shalant had failed to disclose to Castro that he had been enrolled inactive by the State Bar before entering a new fee-splitting agreement with Castro and successor counsel. The fee-splitting agreement ultimately resulted in a payment of $745,000 in fees to Shalant.

Even though the duty issue was never properly raised by Shalant on appeal, the Court of Appeal reversed the judgment and found there was "no authority ... that Shalant had a duty to disclose to Castro that Shalant was enrolled inactive by the state bar." (Ex. A at p. 14.) Castro filed a petition for rehearing citing relevant authorities on the issue, but the Court of Appeal denied the petition without discussing these authorities. (Ex. B.)

Although this portion of the Court of Appeal's opinion is unpublished, review should be granted because this is an important question of law regarding an attorney's ethical responsibilities, and even an unpublished opinion could be used in the future by attorneys seeking to justify avoidance of their duty to advise existing clients of their inactive State Bar status. Indeed, even an attorney who is genuinely seeking guidance on the issue could be seriously misled by the unpublished portion of the Court of Appeal's opinion. As demonstrated herein, the Court of Appeal failed to consider authorities supporting petitioner's argument that Shalant had a duty to disclose his inactive State Bar status before entering

into a new fee-splitting agreement with him and successor counsel. Review should be granted because this is an important question of law regarding the ethical duties of lawyers placed on inactive status.

Alternatively, review should be granted and the case transferred back to the Court of Appeal with directions to grant rehearing pursuant to Government Code section 68081. In his opening brief, Shalant never contested that he had a duty to disclose his inactive State Bar status to Castro. He did not raise this as an issue in the appeal. As a result, Castro did not treat it as a separate issue and only referred to the duty element in passing in his respondent's brief. (RB 13, 19-21.) Once the Court of Appeal raised and decided the duty issue for the first time in its opinion, Castro filed a petition for rehearing citing relevant authorities and requesting an opportunity for supplemental briefing pursuant to Government Code section 68081. However, the Court of Appeal concluded that no rehearing was required because of Castro's passing references to the duty issue in his respondent's brief. (Ex. B.)

The Court of Appeal's denial of rehearing was unfair to Castro because it deprived him of a full opportunity to brief what ultimately turned out to be dispositive issue. The Court of Appeal never even considered the authorities cited in Castro's petition for rehearing. Castro did not cite these authorities or brief the issue in his respondent's brief because the issue

simply was not raised in the opening brief. For this reason, review should at least be granted for the limited purpose of transferring the case back to the Court of Appeal with directions to grant rehearing pursuant to Government Code section 68081.

BACKGROUND

For the purpose of this petition for review only, petitioner incorporates by reference the Background section of the Court of Appeal's opinion. (Ex. A at pp. 2-7.)

Castro's theory of the case at trial was that Shalant failed to disclose his inactive State Bar status to Castro in June 2005, when Shalant entered into a fee-splitting agreement with Castro and successor counsel, Thomas V. Girardi. (1 CT 38.) After hearing the evidence and receiving instructions on this theory (1 CT 153), the jury returned a verdict in favor of Castro on his claim against Shalant for breach of his fiduciary duty to disclose his State Bar status. (2 CT 459.)

On appeal, Shalant never contested that he had a legal duty to disclose his inactive State Bar status to Castro.[2] In the *introduction* of his opening brief, he claimed that the jury erred by "finding *damages* for breach

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[2]Although Shalant was declared a vexatious litigant in 2002 and was subject to a prefiling order pursuant to Code of Civil Procedure section 391.7, he represented himself on appeal without obtaining permission from the administrative presiding judge, as required by *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211.

of fiduciary duty/legal malpractice when there was no evidence whatsoever of any such *breach*." (AOB 2, emphasis added.) However, Shalant never contested the *duty* element, and he never followed up on this introductory sentence with a proper argument, argument heading, or citation to legal authorities. (See Cal. Rules of Court, rule 8.204(a)(B) [opening brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation to authority"].)

In his respondent's brief, Castro addressed all of the issues raised by Shalant in the opening brief. During his discussion of these issues, Castro made brief references to former rule 955 of the California Rules of Court as the authority for Shalant's duty to notify clients of his *disbarment*. (RB 13, 20.) However, Castro did not discuss the legal basis for Shalant's duty to disclose his inactive State Bar status, which occurred seven months *before* the disbarment. Castro did not address this issue because it had not been raised in Shalant's opening brief.

The Court of Appeal issued its opinion on April 5, 2010. In its opinion, the court stated that "respondents cite no authority, and we have found none, that Shalant had a duty to disclose to Castro that Shalant was enrolled inactive by the state bar." (Ex. A at p. 14.) Finding that Shalant had no such duty of disclosure, the court reversed the judgment. (*Ibid.*)

Castro filed a petition for rehearing pursuant to Government Code section 68081, arguing that the issue of Shalant's duty to disclose his inactive State Bar status had not been raised or briefed in the appeal. Castro's petition cited relevant authorities in support of the existence of such a duty. However, the Court of Appeal denied rehearing without discussing these authorities. The Court of Appeal reasoned: "No rehearing is required because, on pages 13 and 19 through 21 of his respondent's brief, Castro did brief the issues of (1) whether the judgment is supported by substantial evidence and (2) whether Shalant had a 'duty to disclose his state bar status' to Castro." (Ex. B at p. 2.)

LEGAL DISCUSSION

I.

REVIEW SHOULD BE GRANTED TO DECIDE WHETHER AN ATTORNEY HAS A DUTY TO DISCLOSE TO A CLIENT THAT HE HAS BEEN ENROLLED INACTIVE BY THE STATE BAR BEFORE THE ATTORNEY ENTERS INTO A NEW FEE-SPLITTING AGREEMENT WITH THE CLIENT AND SUCCESSOR COUNSEL

The Court of Appeal found there was "no authority ... that Shalant had a duty to disclose to Castro that Shalant was enrolled inactive by the state bar." (Ex. A at p. 14.) This ruling was erroneous. There *is* authority that supports the existence of such a duty to disclose. These authorities were cited in Castro's petition for rehearing, but ignored by the Court of

Appeal. (Ex. B.)

Rule 3-500 of the California Rules of Professional Conduct states: "A member shall keep a client reasonably informed about significant developments *relating to the employment or representation* ...." (See also Bus. & Prof. Code, § 6068(m) [attorneys have a duty "to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide services"].) Under California law, an attorney "must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147.) More specifically, this duty includes providing information that "is indispensable to the client's ability to make an informed decision regarding whether to accept [a] fee division and whether to retain or discharge a particular attorney." (*Chambers v. Kay* (2002) 29 Cal.4th 142, 157.)

The fact that Shalant was enrolled inactive by the State Bar was clearly a "significant development" relating to his "employment or representation" of the Castros within the meaning of Rule 3-500. (See *People v. Hinkley* (1987) 193 Cal.App.3d 383, 391 [attorney's failure to advise client that he had been enrolled inactive by the State Bar "amounted to a violation of [his] professional responsibility to supply important

information to his client"].) Although the Court of Appeal correctly noted that "Shalant did promptly arrange for Girardi to substitute in as Castro's attorney" (Ex. A at p. 14), Castro still had a right to be informed of Shalant's State Bar status for the purpose of deciding whether to agree to the fee division between Girardi and Shalant. (See *Chambers v. Kay*, *supra*, 29 Cal.4th at p. 157.) The fact that this crucial information was withheld from Castro deprived him of the ability to make an informed and intelligent decision on the fee-splitting agreement. This was the whole theory on which the breach of fiduciary duty claim was tried to the jury.

The Court of Appeal's opinion does not mention Rule 3-500 or the authorities cited in this petition. Review should be granted because this is an important question of law regarding the ethical responsibilities of attorneys placed on inactive status, and the Court of Appeal decided the issue without considering relevant legal authorities.

II.

ALTERNATIVELY, REVIEW SHOULD BE GRANTED AND THE CASE TRANSFERRED BACK TO THE COURT OF APPEAL WITH DIRECTIONS TO GRANT REHEARING PURSUANT TO GOVERNMENT CODE SECTION 68081

Government Code section 68081 provides that rehearing must be granted if the Court of Appeal has rendered a decision "based upon an issue which was not proposed or briefed by any party to the proceeding"

without first affording the parties an opportunity to submit supplemental briefs. As discussed above, Shalant did not argue in his opening brief that he had no duty to disclose his inactive State Bar status to Castro, and Castro did not brief the issue in his respondent's brief. Although this ultimately turned out to be the dispositive issue (Ex. A at p. 14), the Court of Appeal never afforded Castro an opportunity to submit supplemental briefing on the issue. (Ex. A at p. 14.) This violated Government Code section 68081. (See *People v. Alice* (2007) 41 Cal.4th 668, 674-679; *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1149-1150.)

Contrary to the Court of Appeal's order denying rehearing (Ex. B at p. 2), Castro did *not* brief this issue in his respondent's brief. In the course of discussing *other* issues raised by Shalant, Castro only briefly referred to Rule 955 of the California Rules of Court as the authority for Shalant's duty to disclose his *disbarment*. (RB 13, 20.) Castro did *not* discuss the legal basis for Shalant's duty to disclose his inactive State Bar status, which occurred seven months *before* his disbarment. This issue "was not proposed or briefed by any party to the proceeding." (Gov. Code, § 68081.)

"The purpose behind section 68081 is to prevent decisions based on issues on which the parties have had no *opportunity* for input." (*People v.*

Taylor (1992) 6 Cal.App.4th 1084, 1090.) A party has an opportunity to brief an issue if it is "fairly included within the issues actually raised." (*People v. Alice*, *supra*, 41 Cal.4th at p. 677.) Castro had no opportunity to brief the issue of Shalant's duty to disclose his inactive State Bar status because it was not "fairly included within the issues actually raised" in the appeal. (*Ibid.*) Accordingly, rehearing should have been granted pursuant to section 68081.

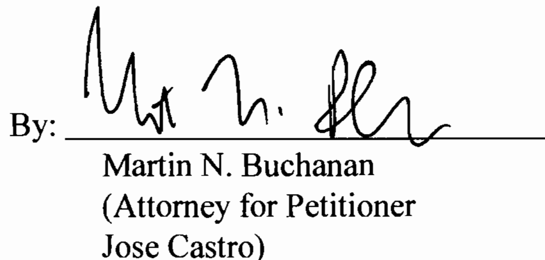
For these reasons, petitioner respectfully submits that this Court should at least grant review and transfer the matter back to the Court of Appeal with directions to grant rehearing pursuant to section 68081. "[J]udges, including appellate judges, are required to follow the law." (*California Casualty Ins. Co.*, *supra*, 46 Cal.App.4th at p. 1147 [granting extraordinary writ relief and directing appellate department of superior court to grant rehearing pursuant to section 68081].)

CONCLUSION

For all the foregoing reasons, petitioner respectfully submits that review should be granted.

Dated: May 12, 2010

NIDDRIE, FISH & BUCHANAN, LLP

By: 

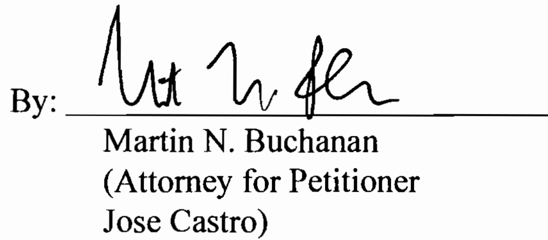
Martin N. Buchanan
(Attorney for Petitioner
Jose Castro)

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I certify that the foregoing Petition for Review was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 2,297 words.

Dated: May 12, 2010

NIDDRIE, FISH & BUCHANAN, LLP

By: 

Martin N. Buchanan
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Jose Castro)

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Filed 4/5/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOSEPH L. SHALANT, Plaintiff and Appellant, v. THOMAS V. GIRARDI et al., Defendants and Respondents.	B211932 c/w B214302 (L.A.Super.Ct. No. BC 363843 c/w BC 366214)
JOSE CASTRO, Plaintiff and Respondent, v. JOSEPH L. SHALANT, Defendant and Appellant.	B214302 c/w B211932 (L.A.Super.Ct. No. BC 366214 c/w BC 363843)

APPEALS from judgments of the Superior Court of Los Angeles County. Teresa Sanchez-Gordon, Judge. Judgment in B211932 reversed with directions; judgment in B214302 affirmed in part and reversed in part with directions.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II.

Law Offices of Brian A. Yapko and Brian A. Yapko for Plaintiff and Appellant in B211932.

Joseph L. Shalant, in pro. per., for Defendant and Appellant in B214302.

Girardi | Keese and Shawn J. McCann for Defendant and Respondent Thomas V. Girardi; Lewis Brisbois Bisgaard & Smith and Rebecca R. Weinreich for Defendant and Respondent National Union Fire Insurance Company of Pittsburgh, PA. in B211932.

Girardi | Keese and Shawn J. McCann for Plaintiff and Respondent Jose Castro in B214302.

In the first of these consolidated appeals, Joseph L. Shalant challenges the dismissal of his complaint against Thomas V. Girardi and Nation Union Fire Insurance Company. The superior court dismissed the complaint on the ground that Shalant, a vexatious litigant, was in violation of the prefiling order that had been entered against him pursuant to Code of Civil Procedure section 391.7.[1] In the published portion of our opinion, we conclude that because Shalant was initially represented by counsel, who filed the complaint on Shalant's behalf, Shalant did not violate the prefiling order by later appearing in the case in propria persona. Accordingly, we reverse the dismissal.

In the second appeal, Shalant challenges the judgment entered against him on Jose Castro's complaint in a related action. In the unpublished portion of our opinion, we conclude that the judgment against Shalant is not supported by substantial evidence and must be reversed as well.

BACKGROUND

In a prior action in 2002, the superior court entered an order declaring Shalant to be a vexatious litigant within the meaning of section 391. On that basis the court entered a "prefiling order" pursuant to section 391.7. The prefiling order provides that Shalant

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

"is prohibited from filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed." In 2004, on appeal from the final judgment in that action, the Court of Appeal affirmed the trial court's determination that Shalant is a vexatious litigant. (*Shalant v. Deutsch* (Feb. 4, 2004, B157103) [nonpub. opn.].)

On December 22, 2006, Shalant, represented by counsel, filed the instant action against Girardi, Continental Casualty Company, and National Union. The complaint alleges that Shalant and Girardi jointly represented Castro and his wife as the plaintiffs in a personal injury matter, in which Continental and National Union were the defendants' insurers. According to Shalant's complaint, when the Castros' matter settled Continental and National Union issued the settlement payment to the Castros and Girardi alone, without including Shalant as a payee or giving him notice, despite Continental and National Union's awareness of his attorney's fees lien on the settlement proceeds. Thereafter, the complaint alleges, Girardi paid Shalant $745,000 of the proceeds as attorney's fees but refused to pay an additional $27,745.34 to which Shalant was entitled "as the balance of his fee interest and as reimbursement of costs." Shalant alleged claims for breach of contract, breach of the covenant of good faith and fair dealing, an accounting, and intentional and negligent interference with prospective economic advantage.[2] Shalant sought to recover actual damages in the amount of $27,745.34 and punitive damages in the amount of $5,000,000.

On January 22, 2006, Girardi filed a cross-complaint against Shalant. Girardi alleged that Shalant was disbarred on May 18, 2005, before entering into the contract that formed the basis for Shalant's complaint, and that Shalant had misrepresented his bar status to Girardi and the Castros to induce them to enter into the contract. Girardi sought to recover actual damages in the amount of $745,000 and punitive damages in the amount

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[2] Shalant omitted Continental as a defendant in his second and third amended complaints, and as far as we can determine from the record Continental is no longer a party to this action. We will accordingly omit Continental from the remainder of our discussion.

of $7,000,000. Shalant's state bar records (introduced by Girardi) indicate that the actual chronology differs from the allegations of the cross-complaint. Shalant was involuntarily "enrolled inactive" by the state bar on May 18, 2005, effective no later than May 21, 2005. On December 14, 2005, the Supreme Court filed an order disbarring Shalant, effective January 13, 2006. (See Cal. Rules of Court, rule 9.18(a).)

On February 13, 2007, Castro filed a complaint against Shalant. Castro's operative second amended complaint alleges claims for fraud, concealment, negligent misrepresentation, and breach of fiduciary duty. The pleading alleges that Shalant either misrepresented or failed to disclose various facts about his impending discipline by the bar (e.g., Shalant allegedly told Castro that he "had a minor infraction with the California [s]tate [b]ar" that would likely lead to nothing more than a suspension of at most 90 days), and that as a result Castro entered into a joint-representation and fee-splitting agreement with Shalant and Girardi that contained "less favorable terms regarding fees and costs than [Castro] was entitled to." In his action against Shalant, Castro (represented by Girardi) sought to recover actual damages in the amount of $745,000 and punitive damages in the amount of $7,000,000.

On September 4, 2007, National Union filed a cross-complaint against the Castros for indemnity and related claims.

In May 2007, new counsel for Shalant substituted into the case, replacing the attorney who had filed the complaint on Shalant's behalf. Seven months later, Shalant substituted in as his own attorney on Girardi's cross-complaint. The following month Shalant substituted in as his own attorney on his complaint as well. Two months after that, Shalant's original counsel substituted back into the case, replacing Shalant. Three months later, however, Shalant's attorney filed an ex parte application to be relieved as counsel. On July 15, 2008, the trial court granted counsel's application, leaving Shalant self-represented once again.

On July 29, 2008, Girardi filed a notice of Shalant's status as a vexatious litigant subject to a prefiling order. On July 30, 2008, National Union filed a motion to dismiss Shalant's complaint for failure to comply with section 391.7.

Shalant filed an application for permission to proceed in propria persona, but the application is not part of the record on appeal. The record does, however, include the presiding judge's minute order dated August 12, 2008, denying Shalant's application on the ground that "no proof of service is attached to establish that notice was given to all parties." On the same day and in response to the court's order, Shalant submitted a handwritten letter to the presiding judge. In it, Shalant contended that the relevant statutory provisions and case law do not require him to serve his application on opposing parties. He asked the court to inform him if the court disagreed, and he said he would be "happy" to serve the other parties and would do so "immediately" if the court was of the opinion that service was required.

On August 13, 2008, Girardi filed an ex parte application to dismiss Shalant's complaint pursuant to section 391.7 or, in the alternative, for an order shortening time to hear a motion to dismiss on that ground. On August 14, 2008, the court calendared National Union's and Girardi's motions to dismiss for hearing on September 18, 2008, and the court ordered Shalant "to request permission from the presiding [j]udge to proceed in this matter." Also on August 14, the presiding judge entered a minute order noting receipt of Shalant's handwritten letter of August 12, which the court considered to be an "improper ex-parte communication" because it was not served on defendants. The court returned the letter to Shalant without further comment.

At some subsequent date, Shalant filed and served a new application for permission to proceed in propria persona. The copy of the application in the record on appeal bears no file stamp, but Shalant states in his opening brief that the application was filed on August 18. The proof of service is dated August 18. The trial court calendared Shalant's application for hearing on October 1, 2008 (that is, nearly two weeks after the September 18 hearing on the motions to dismiss).

On September 18, 2008, the trial court heard and granted the motions to dismiss on the ground that Shalant had failed to comply with section 391.7. Shalant did not appear at the hearing.[3] On October 20, 2008, the court entered judgment in favor of National Union on Shalant's complaint. Shalant timely appealed.

The case proceeded to a jury trial on Girardi's and Castro's claims against Shalant. The evidence introduced at trial revealed the following sequence of events: The Castros first retained Shalant to represent them in their personal injury matter no later than the spring or summer of 2003. Castro testified that Girardi substituted for Shalant "sometime around June 2005" and that he understood that thereafter Shalant "would no longer be representing him" and that Girardi would be his "only lawyer."[4] The Castros settled the personal injury matter in January 2006 ("[o]n or about January 20, 2006," according to the Castros' repondents' brief).

The jury found by special verdict that Shalant did not make a false representation of an important fact to Castro or Girardi and that Shalant did not intentionally fail to disclose to Castro or Girardi an important fact that they did not know and could not reasonably have discovered. The jury also found, however, that Shalant breached the duty of an attorney and that the breach was a substantial factor in causing Castro harm. The jury determined that Castro had suffered no economic damages but had suffered noneconomic damages in the amount of $55,000. The jury also awarded Castro punitive damages of $100,000, having found that Shalant acted with malice, oppression, or fraud. The jury awarded no damages, compensatory or punitive, to Girardi.

On February 4, 2009, the trial court entered judgment on the jury verdict. Shalant timely appealed, and we consolidated the case with the earlier appeal from the judgment

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[3] Shalant claims that he inadvertently missed the hearing because he mistakenly believed that it had been continued to a later date.

[4] Castro's wife testified that it was her understanding that Shalant "was continuing to act as" her lawyer even after Girardi substituted in, because Shalant periodically phoned and "offered advice." ("He just often talked about the case and how much it was worth and moneywise and stuff like that.") Her testimony is of limited relevance, however, because only Castro himself is a plaintiff on the complaint against Shalant. His wife is not a party to that action.

that was entered after the granting of the motions to dismiss.[5] Neither Castro nor Girardi filed a cross-appeal.

DISCUSSION

I. Section 391.7 Governs Only the Initiation of a Lawsuit

Shalant argues that because section 391.7 concerns only the filing of a new action and Shalant was represented by counsel when he filed his complaint, the trial court erred when it granted the motions to dismiss. We review this issue of statutory interpretation de novo (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219), and we agree with Shalant.

National Union's and Girardi's motions sought dismissal of Shalant's action on the basis of Shallant's alleged violation of the prefiling order issued pursuant to section 391.7. Our analysis therefore must address the terms of both the statute and the order.

Subdivision (a) of section 391.7 provides in relevant part: "[T]he court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." For purposes of the vexatious litigant statutes, including section 391.7, "litigation" is "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).)

The prefiling order entered against Shalant (on a form approved by the Judicial Council) prohibits Shalant "from filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed." The order closely tracks the language of section 391.7 and at one point substitutes the term "action" for the statutory term "litigation" ("court in which the action is to be filed" instead of "court where the litigation is proposed to be filed"), in keeping with the statutory definition ("litigation" is "any civil action or proceeding").

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[5] In view of our consolidation of the appeals, we deny as moot Shalant's motion to augment the record in the first appeal to include the jury verdict that is the subject of the second appeal.

Shalant filed only one civil action or proceeding in this case, namely, his action against Girardi and National Union. He did not file it in propria persona but rather filed it through counsel. Nothing in the prefiling order prohibits Shalant from continuing to *prosecute* or *maintain* an action in propria persona as long as he did not *file* the action in propria persona (and nothing in the statutory language would authorize the issuance of a prefiling order containing such a prohibition). Shalant therefore did not violate the prefiling order, and the trial court erred by granting the motions to dismiss.

Our analysis cannot end there, however, because *Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183 (hereafter *Forrest*), held that "the requirements of a prefiling order, under section 391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or without the permission of the presiding judge." (*Id.* at p. 197.) In *Forrest*, the plaintiff was declared a vexatious litigant and became subject to a prefiling order in 1994. (*Id.* at p. 188.) In 2003, the plaintiff filed a complaint in propria persona but did not serve it on the defendants. (*Id.* at p. 189.) The plaintiff then retained counsel, who filed and served a first amended complaint. (*Ibid.*) Later, the plaintiff's counsel withdrew, and the defendants moved to dismiss on the basis of section 391.7, subdivision (c), which provides that once a defendant files and serves notice that the litigation was filed in violation of a prefiling order, the litigation "shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation . . . ." (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 190-192.) When the plaintiff failed, after a number of continuances, to retain new counsel or obtain permission from the presiding judge to proceed in propria persona, the trial court dismissed the complaint. (*Id.* at p. 193.)

The Court of Appeal affirmed. (*Forrest*, *supra*, 150 Cal.App.4th at p. 188.) The court began its analysis by observing that section 391.7 "has been broadly interpreted." (*Id.* at p. 195.) The court also noted that "the definition of 'litigation' encompasses lawsuits beyond the initial filing to include those that are maintained or pending." (*Id.* at

pp. 196-197.) The court went on to reason that the phrase "any new litigation" in subdivision (a) of section 391.7—which authorizes the issuance of a prefiling order that prohibits filing "any new litigation" in propria persona without permission of the presiding judge—"plainly refers to a civil lawsuit filed *after* entry of the prefiling order," not "to an early procedural stage in the lawsuit." (*Id.* at p. 196.) That is, the word "new" in subdivision (a) of section 391.7 does not limit a prefiling order to the *initiation* of a lawsuit but rather indicates that such an order applies only to lawsuits initiated *after* the order is issued. The court also observed that "a litigant may be designated 'vexatious' for actions throughout the life of a lawsuit, not merely at its commencement," and the court concluded that "[i]t would be anomalous for the statute to permit the entry of a prefiling order based on a litigant's bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency." (*Id.* at p. 197.) For all of those reasons, the court concluded that "the terms of the prefiling order—representation by counsel or permission to file—pertain throughout the life of the lawsuit," so dismissal is permitted any time the vexatious litigant proceeds without counsel and without the permission of the presiding judge. (*Id.* at p. 197.)

The panel was not, however, unanimous. The dissent began by stating that "[t]he majority has rewritten Code of Civil Procedure section 391.7 to say what it believes the statute should say." (*Forrest*, *supra*, 150 Cal.App.4th at p. 205 (dis. opn. of Ashmann-Gerst, J.).) In particular, the dissent observed that "nothing in section 391.7 expressly prohibits a vexatious litigant from proceeding in propria persona after his or her complaint has been filed by an attorney then representing the plaintiff." (*Id.* at p. 206.) For that reason and others, the dissent found that "the statute is, at best, ambiguous." (*Id.* at p. 207.) The dissent ultimately concluded, on the basis of public policy considerations, that "[the plaintiff's] action should not have been dismissed pursuant to section 391.7" and that, in general, "a prefiling order governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation." (*Id.* at pp. 207-208.)

We agree with the *Forrest* dissent's conclusion that a prefiling order issued pursuant to section 391.7 governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation. We do not, however, find any pertinent ambiguity in the language of either the statute or the prefiling order entered against Shalant, and we therefore see no need to resort to extrinsic interpretive aids such as public policy considerations.

As we noted at the outset, the statutory definition of "litigation" for purposes of section 391.7 is "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) Thus, litigation is a civil action or proceeding (such as a writ proceeding). Section 391.7, subdivision (a), authorizes the issuance of a prefiling order that "prohibits a vexatious litigant from filing any new litigation" in propria persona without permission of the presiding judge. Thus, if we insert the statutory definition of "litigation," we find that subdivision (a) of section 391.7 authorizes issuance of a prefiling order that prohibits a vexatious litigant from *filing any new civil action or proceeding* in propria persona without permission. That is precisely what the prefiling order in this case does: The order prohibits Shalant "from filing any new litigation [i.e., civil action or proceeding] in propria persona" without permission of the presiding judge. Once that condition is satisfied—that is, once the suit has been filed either with permission of the presiding judge or by counsel representing the plaintiff—nothing in the language of the order prohibits Shalant from prosecuting the action in propria persona, and nothing in the language of the statute would authorize the issuance of an order that did prohibit it.

We do not find the *Forrest* majority's arguments to the contrary persuasive. First, the majority's interpretation of the term "new" does not affect our analysis. Assuming that the *Forrest* majority is correct that the phrase "any new litigation" in subdivision (a) of section 391.7 refers to any litigation commenced after the prefiling order is issued, the statute still authorizes only the issuance of prefiling orders that prohibit the filing of civil actions or proceedings in propria persona and without permission of the presiding judge.

The statute says nothing about prohibiting a vexatious litigant from *prosecuting* a new action in propria persona if the action was properly *filed.*

Second, we are not persuaded by the claim that "[i]t would be anomalous for the statute to permit the entry of a prefiling order based on a litigant's bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency." (*Forrest*, *supra*, 150 Cal.App.4th at p. 197.) That purported anomaly cannot change what section 391.7 says. The statute authorizes nothing more than the issuance of prefiling orders that prohibit the filing of new civil actions or proceedings in propria persona and without permission. By its terms, the statute does not authorize issuance of prefiling orders that regulate the conduct of actions properly commenced.

Third, we believe that both the majority and the dissent in *Forrest* misperceived the import of the statutory definition of the term "litigation." Again, the definition of "litigation" for purposes of the vexatious litigant statutes, including section 391.7, is "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) Both the majority and the dissent in *Forrest* appear to have inferred that the reference to litigation that is "pending" or being "maintained" suggests that section 391.7's authorization of prefiling orders concerning "litigation" extends to the conduct of litigation that is already in progress. (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 196-197; *id.* at p. 206 (dis. opn. of Ashmann-Gerst, J.).) No such inference is warranted. The Legislature adopted a general definition of the term "litigation" so that the term could be used throughout the vexatious litigant statutes to refer to various types of civil actions or proceedings at various stages of progress and in various courts. But *as used in the context of a particular statutory provision* the term can have a more specific meaning, referring only to a part of the general category of actions included within the definition.

A simple example illustrates the point: The statutory definition of "litigation" includes civil actions or proceedings "in any state or federal court." (§ 391., subd. (a).)

But subdivision (a) of section 391.7 authorizes only prefiling orders that bar the filing of litigation "in the courts of this state." The general statutory definition of "litigation," which covers actions in federal court as well as the courts of other states, does not mean that, contrary to its own terms, subdivision (a) of section 391.7 authorizes California courts to bar vexatious litigants from filing actions in federal court or the courts of other states. Rather, the language of section 391.7, subdivision (a), makes clear that the term "litigation" *as used in that provision* refers only to a subset of the larger category of actions that are included within the statutory definition—it there refers only to actions in California courts.

Similarly, the general statutory definition of "litigation," which covers actions that are already pending, does not mean that, contrary to its own terms, subdivision (a) of section 391.7 authorizes California courts to issue prefiling orders that regulate the conduct of actions that are already pending. Rather, the language of section 391.7, subdivision (a), makes clear that the term "litigation" *as used in that provision* refers only to a subset of the larger category of actions that are included within the statutory definition—it there refers only to actions that the plaintiff proposes to file but has not yet filed.

Fourth and finally, we disagree with the *Forrest* majority's reliance on the statement that "[s]ection 391.7 has been broadly interpreted." (*Forrest*, *supra*, 150 Cal.App.4th at p. 195.) Taken as a purely descriptive claim, the statement is probably true—section 391.7 does appear to have been interpreted broadly. (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 195-196 & fn. 4 [collecting cases].) But taken as a normative claim—that section 391.7 *should be* interpreted broadly—the statement is incorrect, because the Court of Appeal has repeatedly upheld the vexatious litigant statutes (including section 391.7) against constitutional challenges on the ground that the statutes are *narrowly drawn* and thus do not impermissibly invade the right of access to the courts. (See *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 55-57, 60; *Luckett v. Panos* (2008) 161 Cal.App.4th 77, 81; *In re R.H.* (2009) 170 Cal.App.4th 678,

702; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 541.) Given the important constitutional concerns that section 391.7 implicates, we conclude that the statute should not be broadly interpreted. Rather, it should be applied strictly according to its terms.

We sympathize with the plight of already overburdened trial courts that are forced to contend with the abusive conduct of vexatious litigants. But in their efforts to deal with the problem of vexatious litigants, courts must observe the limits set by the applicable statutory scheme. If those limits are too confining, then it is the function of the Legislature, not the courts, to expand them.

In addition, our holding today does not leave defendants or trial courts without remedies for dealing with vexatious litigants, frivolous lawsuits, or abusive litigation conduct. For example, vexatious litigants may be required to post security (§ 391.1), attorneys and self-represented parties may, under certain conditions, be sanctioned for pursuing frivolous litigation (§ 128.7), and sanctions may be imposed for discovery abuses as well (§§ 2023.010-2023.040).

For all of the foregoing reasons, we conclude that section 391.7 authorizes the issuance of prefiling orders that "govern[] only the initiation of a lawsuit, not what occurs during the prosecution of the litigation." (*Forrest*, *supra*, 150 Cal.App.4th at p. 208 (dis. opn. of Ashmann-Gerst, J.).) The prefiling order entered against Shalant does not exceed that statutory authorization. It prohibits him from filing a new civil action or proceeding in propria persona without permission of the presiding judge, but it does not prohibit him from prosecuting (in propria persona and without permission) an action that was filed in compliance with those requirements. The trial court therefore erred in granting the motions to dismiss.

II. The Verdict Against Shalant Is Not Supported by Substantial Evidence

Shalant argues that the verdict on the breach of fiduciary duty claim must be reversed because "there was no evidence whatsoever of any such breach." We agree that the verdict on that claim is not supported by substantial evidence.

The trial court instructed the jury as follows on the breach of fiduciary duty claim: "Jose Castro claims that he was harmed because Joseph L. Shalant breached an attorney's duty in failing to disclose his state bar status to his clients. To establish this claim, Jose Castro must prove all of the following: that Joseph L. Shalant breached the duty of an attorney to disclose his state bar status to his clients; that Jose Castro was harmed; and that Joseph L. Shalant's conduct was a substantial factor in causing Jose Castro's harm." The jury was not instructed on any other legal or factual theory of breach of fiduciary duty. Thus, the only basis on which the jury could have found a breach of fiduciary duty was by finding that Shalant breached a duty "to disclose his state bar status" to Castro.

The record contains no evidence that Shalant breached such a duty. The record does contain evidence that after being enrolled inactive by the state bar in May 2005 but before being disbarred in December 2005 (effective in January 2006), Shalant did not disclose his inactive status to Castro. But that evidence cannot support Castro's claim that Shalant breached a duty "to disclose his state bar status" because respondents cite no authority, and we have found none, that Shalant had a duty to disclose to Castro that Shalant was enrolled inactive by the state bar. Once he was enrolled inactive, Shalant could no longer practice law, and the record reflects that Shalant did promptly arrange for Girardi to substitute in as Castro's attorney.[6] But respondents cite no authority (and we have found none) for the proposition that Shalant also had a duty to disclose to Castro *why* he would no longer be handling the case.

The record likewise contains no evidence that Shalant breached a duty to disclose to Castro that Shalant was disbarred. The Supreme Court entered its order disbarring Shalant on December 14, 2005, so the order was effective January 13, 2006. (Cal. Rules of Court, rule 9.18(a).) By Castro's admission, Shalant ceased representing Castro

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6 Castro himself testified that the substitution took place "sometime around June 2005" and that he understood that thereafter Shalant "would no longer be representing" him and that Girardi would be his "only lawyer."

"sometime around June 2005." Respondents cite no authority, and we have found none, for the proposition that Shalant had a duty to disclose his disbarment to former clients.

In addition, the Supreme Court's disbarment order directed Shalant to comply with subdivision (a) of rule 9.20 (formerly rule 955) of the California Rules of Court within 30 days of the effective date of the Court's order. The rule required Shalant to "[n]otify all clients being represented in pending matters" of his disbarment. (Cal. Rules of Court, rule 9.20(a).) The rule, and hence the order, did not require Shalant to notify former clients like Castro—the notification requirement is expressly limited to clients being represented in pending matters, and Castro admits that Shalant no longer represented him. Moreover, the deadline for notification under the Supreme Court's order was February 12, 2006 (30 days after the effective date of January 13, 2006). The record contains no evidence that Shalant failed to notify Castro of his disbarment by February 12. Indeed, Castro testified that he learned of Shalant's disbarment in "early February 2006." Consequently, even if Castro did not learn of the disbarment *from Shalant*, there is no evidence of causation, because Castro cannot have been harmed by Shalant's failure to disclose facts Castro already knew.[7]

For all of the foregoing reasons, we agree with Shalant that the verdict in favor of Castro on the breach of fiduciary duty claim is not supported by substantial evidence. We accordingly reverse and direct the trial court to enter judgment in favor of Shalant on that claim.

DISPOSITION

The judgment in B211932 is reversed, and the superior court is directed to enter a new and different order denying Girardi's and National Union's motions to dismiss.

The judgment in B214302 is reversed with respect to Castro's breach of fiduciary duty claim against Shalant, and the superior court is directed to enter judgment in favor of

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[7] Castro's wife testified that Shalant has never personally informed her that he was disbarred. The testimony is irrelevant because Castro's wife is not a plaintiff. (See also fn. 4, *ante*.) Castro's wife also testified that she learned of Shalant's disbarment (though not *from Shalant*) at the same time as her husband.

Shalant on that claim. The judgment is affirmed with respect to the remainder of Castro's claims against Shalant and with respect to Girardi's claims against Shalant.

Appellant shall recover his costs on both of these consolidated appeals.

<u>CERTIFIED FOR PARTIAL PUBLICATION</u>.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.

Filed 4/23/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOSEPH L. SHALANT, Plaintiff and Appellant, v. THOMAS V. GIRARDI et al., Defendants and Respondents.	B211932 c/w B214302 (L.A.Super.Ct. No. BC 363843 c/w BC 366214) ORDER MODIFYING OPINION AND DENYING REHEARING (Teresa Sanchez-Gordon, Judge) [NO CHANGE IN JUDGMENT]
JOSE CASTRO, Plaintiff and Respondent, v. JOSEPH L. SHALANT, Defendant and Appellant.	B214302 c/w B211932 (L.A.Super.Ct. No. BC 366214 c/w BC 363843)

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II.

THE COURT:

IT IS ORDERED that the opinion filed herein on April 5, 2010, be modified in the following particulars:

On page 14, second paragraph, add a new footnote 7 at the end of the last sentence ending with "case," which will require renumbering of all subsequent footnotes, and add as footnote 7, the following text:

> In his petition for rehearing, Castro argues that "rehearing should be granted to permit supplemental briefing pursuant to Government Code section 68081." That statute requires us to grant a petition for rehearing if we have rendered a decision "based upon an issue which was not proposed or briefed by any party to the proceeding" without first affording the parties an opportunity to submit supplemental briefs. (Gov. Code, § 68081.) No rehearing is required because, on pages 13 and 19 through 21 of his respondent's brief, Castro did brief the issues of (1) whether the judgment is supported by substantial evidence and (2) whether Shalant had a duty "to disclose his state bar status" to Castro.

This modification does not have an effect on the judgment.

Respondent Castro's petition for rehearing is denied.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 750 B Street, Suite 3300, San Diego, California 92101. On May 12 2010, I served the foregoing **PETITION FOR REVIEW** by mailing a copy by first class mail in separate envelopes addressed as follows:

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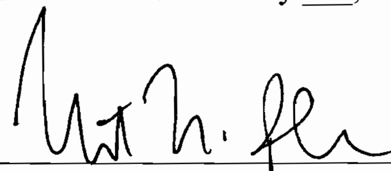
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 12, 2010, at San Diego, California.



Martin N. Buchanan